FILED
MAY 17 1991
OFFICE OF THE CLERK

No. 90-1466

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENTRY E. MCKINNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
KAREN SKRIVSETH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in a prosecution under the Bank Secrecy Act, 31 U.S.C. 5322 and 5324(3), for structuring financial transactions to evade the requirement that a bank report such transactions in excess of $10,000, specific knowledge that such structuring is illegal is an element of the offense.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

American Surety Co. v. *Sullivan*, 7 F.2d 605 (2d Cir. 1925)	7
Cheek v. *United States*, 111 S. Ct. 604 (1991)	6, 8
Liparota v. *United States*, 471 U.S. 419 (1985)	7
Screws v. *United States*, 325 U.S. 91 (1945)	8
United States v. *Balint*, 258 U.S. 250 (1922)	8
United States v. *Bank of England*, 821 F.2d 844 (1st Cir.), cert. denied, 484 U.S. 943 (1987)	9
United States v. *Behrman*, 258 U.S. 280 (1922)	8
United States v. *Dichne*, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980)	8
United States v. *Eisenstein*, 731 F.2d 1540 (11th Cir. 1984)	9
United States v. *Granda*, 565 F.2d 922 (5th Cir. 1978)	8, 9
United States v. *Hoyland*, 903 F.2d 1288, modified, 914 F.2d 1125 (9th Cir. 1990)	4, 7, 8
United States v. *Murdock*, 290 U.S. 389 (1933)	8
United States v. *San Juan*, 545 F.2d 314 (2d Cir. 1976)	8

Cases—Continued: Page

United States v. *Scanio*, 900 F.2d 485 (2d Cir. 1990) 5, 6, 8, 9
United States v. *$359,500 in United States Currency*, 828 F.2d 930 (2d Cir. 1987) 9
United States v. *Wollman & $149,275.66 U.S. Currency*, No. 90-6376 (4th Cir. Mar. 21 1991) 5

Statutes and regulations:

Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*:
31 U.S.C. 5313(a) 2, 5, 6, 7, 10
31 U.S.C. 5322 6
31 U.S.C. 5322(b) 2
31 U.S.C. 5324 ..... 4, 6, 7, 9
31 U.S.C. 5324(1) 6
31 U.S.C. 5324(2) 6
31 U.S.C. 5324(3) 2, 6, 9, 10
Money Laundering Control Act of 1986, Pub. L. 99-570, Tit. I, Subtit. H, 100 Stat. 3207-18 ... 5
Internal Revenue Code, 26 U.S.C. 7201 7
18 U.S.C. 371 2
31 C.F.R.:
Section 103.22 5
Section 103.22(a) 2

Miscellaneous:

H.R. Rep. No. 746, 99th Cong., 2d Sess. (1986) 6
Model Penal Code (1985) 7
S. Rep. No. 433, 99th Cong., 2d Sess. (1986) ... 6

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1466

GENTRY E. MCKINNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1990. The petition for a writ of certiorari was filed on February 25, 1991, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Oregon, petitioner was convicted on one count of conspiring to structure financial transactions for

the purpose of evading the currency-transaction reporting requirements of the Bank Secrecy Act, in violation of 18 U.S.C. 371, and on 61 counts of structuring financial transactions to evade the reporting requirements, in violation of 31 U.S.C. 5322(b) and 5324(3). He was sentenced to 62 concurrent five-year terms of imprisonment, to be followed by a two-year term of supervised release, and was ordered to pay a $2.6 million fine.

1. The evidence at trial, which is not in dispute, showed that between January 12, 1988, and April 25, 1988, petitioner structured $1,524,384 in currency deposits in 14 accounts at five banks for the purpose of evading the requirement that banks file currency transaction reports (CTRs) on currency transactions in excess of $10,000. See 31 U.S.C. 5313(a); 31 C.F.R. 103.22(a).[1] His son-in-law, co-defendant Samuel Waller, structured currency deposits totaling $448,816.97. Pet. App. A2. The deposits on a single day were made at different banks or to different accounts at the same bank. The amount deposited on a single day exceeded $10,000 on 61 days. Stipulation #2; GX 97-9.[2] The currency was in bundles of used $20, $50, and $100 bills. Petitioner sometimes removed $100 from a $10,000 bundle so that a deposit would be less than $10,000. III Tr. 45, 111, 184, 211, 217; IV Tr. 12, 15-16, 42, 86, 95.

Petitioner told his own employees and bank employees that he did not want the bank to file CTRs and did not want to attract the attention of the Internal Revenue Service; he was told by bank officers of a bank's obligation to report large currency transactions; and he repeatedly indicated his

[1] A bank must treat as a single transaction multiple transactions (of which it is aware) on behalf of a single person in a single day that total more than $10,000. Deposits made at night or on the weekend are treated as received on the next business day. 31 C.F.R. 103.22(a).

[2] References to the transcript, exhibits, and trial stipulations are from the government's brief in the court of appeals (at 5-14).

awareness of that obligation. III Tr. 14-15, 112-113, 115-117, 145, 168, 179-181, 202, 211-212. After petitioner was told by one bank that it was reporting aggregated deposits of cash in excess of $10,000 in a single day (including aggregated deposits over a weekend), petitioner stopped his prior practice of making separate deposits for each weekend day and adding cash to them until they totaled slightly less than $10,000. *Id.* at 215-218; GX 97-9. Similarly, after employees of a title company having a similar reporting duty told petitioner that it cumulated currency transactions for reporting purposes, he made no further currency payments to the company. IV Tr. 56, 77, 84.

Petitioner gave five different explanations about the source of the currency he was depositing. He told several bank officers, his own bookkeeper, and officials of the title company that the money consisted of rent payments by tenants of his mobile home parks. III Tr. 17-18, 114, 132-133, 136, 146, 177-178, 235-236; IV Tr. 13, 42-43, 58, 89-90. He told the IRS that the money was from the sale of property in California, even though most of that property had been exchanged rather than sold. See III Tr. 140, 149-150; IV Tr. 142-144; GX 2-1. He told several people that he received cash from the sale of property to Pennzoil, even though Pennzoil had not made a payment to petitioner in cash or otherwise. III Tr. 50-52, 178, 217; IV Tr. 58-59, 91; Stipulation #5; GX 96-5. He told his accountant that the American Security Council would explain the source of the currency, but the Council had not given petitioner currency. III Tr. 72-94. And petitioner told several other people that the funds were from a Middle East investor, "Prince Sasha," but the parties stipulated that that explanation was untrue. III Tr. 76-80, 107, 151-152, 155; IV Tr. 59-60, 90-91; Stipulation #4.

The district court declined petitioner's request to instruct the jury that he could be found guilty only if he knew that

the law prohibited the structuring of transactions to evade the reporting requirements and acted with the purpose of violating that prohibition. Pet. App. A5. The court instead instructed the jury (*ibid.*):

> The Government need not prove that the defendant, Gentry E. McKinney, was specifically aware of the existence of the law he is charged with breaking in this case, 31 U.S.C. Section 5324(3).
>
> Nor must the Government prove that the defendant, Gentry E. McKinney actually knew that structuring as I have defined it for you was itself unlawful. If you find that structuring occurred, and was knowingly and willfully engaged in by the defendant for the specific purpose of evading a reporting requirement that was known by the defendant to exist, that is sufficient.

Petitioner was convicted on all counts.

2. The court of appeals likewise rejected petitioner's contention that the government was required to prove that he knew of the prohibition against structuring financial transactions to evade the duty to report. Pet. App. A7-A8. In so holding, the court relied upon its prior decision in *United States* v. *Hoyland*, 903 F.2d 1288, 1291-1292, as modified, 914 F.2d 1125, 1128-1130 (9th Cir. 1990). In *Hoyland*, the Ninth Circuit explained that Congress was aware when it enacted 31 U.S.C. 5324 in 1986 that several courts of appeals had held that it was not a crime to structure transactions in order to avoid triggering the reporting requirements, and that "Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent." 914 F.2d at 1129. The court continued (*id.* at 1129-1130):

> Unlike the tax and [31 U.S.C.] 5316 currency reporting cases [involving failure to report the importation or exportation of large sums of currency], structuring

> is not the kind of activity that an ordinary person would engage in innocently. Only the person who has a deliberate intention to frustrate the reporting by the banks is guilty of the offense.[3]

ARGUMENT

Petitioner contends (Pet. 15-31) that to establish the offense of structuring currency transactions for the purpose of evading the reporting requirements, the government must prove beyond a reasonable doubt that the defendant knew that such conduct is illegal. The court of appeals correctly rejected that contention. Its holding to that effect in this case and in *United States* v. *Hoyland* is consistent not only with the well-established principle that ignorance of the law is not a defense, but also with the decisions of the only other courts of appeals to have considered the question. *United States* v. *Scanio*, 900 F.2d 485, 487-492 (2d Cir. 1990); *United States* v. *Wollman & $149,275.66 U.S. Currency*, No. 90-6376 (4th Cir. Mar. 21, 1991), slip op. 5-7 (unpublished). Review by this Court therefore is not warranted.

1. Under 31 U.S.C. 5313(a) and its implementing regulations, 31 C.F.R. 103.22, a financial institution must file a CTR for currency transactions in excess of $10,000. Before passage of the Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, 100 Stat. 3207-18, the courts of appeals were in disagreement over whether a

---

[3] The court of appeals rejected petitioner's contentions that a search warrant failed to describe the items to be seized with sufficient particularity, that evidence regarding petitioner's explanations for possession of large amounts of currency was inadmissible, and that petitioner's sentence was inconsistent with the Sentencing Guidelines and unconstitutional. Pet. App. A8-A16. Petitioner does not renew those claims here.

defendant could be held criminally liable for causing a financial institution to violate its statutory reporting obligations under 31 U.S.C. 5313(a). The express purpose of the enactment of 31 U.S.C. 5324 as part of the Money Laundering Control Act of 1986 was to subject third parties to criminal sanctions for such conduct. See S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986); H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986). Specifically, 31 U.S.C. 5324 prohibits a person from causing an institution to file a materially inaccurate report (or no report at all), and from structuring financial transactions, "for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction."[4]

Petitioner contends that in order to establish a violation of 31 U.S.C. 5324(3), the government must show that the defendant was aware of the prohibition against structuring transactions for the purpose of evading reporting requirements. This contention is in conflict with the well-established proposition that ignorance of the law is not a defense to criminal prosecution. *Cheek* v. *United States*, 111 S. Ct. 604, 609 (1991); *United States* v. *Scanio*, 900 F.2d at 489. It is generally sufficient to establish willfulness that a "person charged with the duty knows what he is doing,"

[4] 31 U.S.C. 5324 provides:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Section 5322 imposes criminal sanctions on a person who willfully violates this prohibition.

United States v. *Hoyland*, 914 F.2d at 1129 (quoting *American Surety Co.* v. *Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925)); it is not necessary to show that the defendant knew he was violating a specific statute. *United States* v. *Hoyland*, 914 F.2d at 1129.

The statutory prohibition at issue here, 31 U.S.C. 5324, is no exception to this rule. To be sure, Section 5324 does require proof that the defendant acted with the specific intent to evade the reporting requirements applicable to financial institutions under 31 U.S.C. 5313(a). As a result, in order to establish the offense of structuring financial transactions, the government must prove not only the act of structuring, but also that the defendant knew that financial institutions are required to report large cash transactions. As the Ninth Circuit put it in *United States* v. *Hoyland*, "Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent." 914 F.2d at 1129. But there is no further requirement that the government prove that the defendant knew it was illegal to engage in specified conduct (including the structuring of transactions) to evade the reporting requirements. Compare *Liparota* v. *United States*, 471 U.S. 419, 425 n.9 (1985) ("It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7 U.S.C.] 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulation was illegal."); Model Penal Code § 2.02(9) and Comment 11 (1985).

2. Petitioner relies (Pet. 15-17) on decisions of this Court construing the term "willfully" as used in criminal tax statutes. Those cases, however, do not help him. In a prosecution under 26 U.S.C. 7201 for willful evasion of a tax imposed by the Internal Revenue Code, the government must prove that the defendant knew of his duty to pay the

tax, *Cheek* v. *United States*, 111 S. Ct. at 610-611, but it need not prove that the defendant knew that it was a criminal offense to evade that duty. So here, although the government was required to prove that petitioner knew that a financial institution has a duty to report large currency transactions (since it must prove that he acted for the purpose of evading that duty), it need not show that he knew it is illegal to take steps to evade the reporting requirements.

This conclusion is entirely consistent with the cases on which petitioner relies (Pet. 16-21) that require proof, in the context of particular statutes, that the defendant acted with a "bad purpose." See, *e.g.*, *Cheek* v. *United States*, 111 S. Ct. at 610 (quoting *United States* v. *Murdock*, 290 U.S. 389, 394 (1933); *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion). "With respect to a prosecution for structuring, * * * the requirement that a defendant be shown to have acted with a 'bad purpose' is satisfied by proof that (s)he (1) knew that the bank was legally obligated to report currency transactions exceeding $10,000 and (2) intended to deprive the government of information to which it is entitled." *United States* v. *Scanio*, 900 F.2d at 491.[5]

3. Petitioner's reliance (Pet. 24-28) on cases construing the element of willfulness in cases involving failure to file CTRs or other currency reports is also misplaced.[6] Those

---

[5] Petitioner's objection (Pet. 22-24) to the Ninth Circuit's reliance in *Hoyland* on *United States* v. *Balint*, 258 U.S. 250 (1922), and *United States* v. *Behrman*, 258 U.S. 280 (1922), is insubstantial. In both cases, this Court rejected the argument that the drug laws required proof that the defendant knew his conduct was illegal. The Ninth Circuit in *Hoyland* relied on the two cases as examples of the kinds of conduct that "an ordinary person would [not] engage in innocently." 914 F.2d at 1129. Petitioner's conduct is another such example.

[6] See *United States* v. *San Juan*, 545 F.2d 314, 318 (2d Cir. 1976); *United States* v. *Dichne*, 612 F.2d 632, 636 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980); *United States* v. *Granda*, 565 F.2d 922, 925-926

cases stand for the general proposition that a defendant who has a duty to report a currency transaction may not be held criminally responsible for willfully failing to do so if he does not know he is required to file a report. A person does not commit a crime if he fails to file a report because he is unaware that he is required to do so. By contrast, a person who structures transactions for the specific purpose of evading the legal duty to file CTRs "engage[s] in affirmative conduct and demonstrate[s] an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should have alerted him to the consequences of his conduct." *United States* v. *Scanio*, 900 F.2d at 490.[7]

Here, the jury was instructed that in order to return a verdict of guilty, it had to find that petitioner was aware of the financial institutions' duty to file CTRs for large financial transactions and deliberately structured his financial transactions for the purpose of evading that duty. Because nothing more was required, the instruction was correct.

(5th Cir. 1978); *United States* v. *$359,500 in United States Currency*, 828 F.2d 930, 933 (2d Cir. 1987); *United States* v. *Bank of New England*, 821 F.2d 844, 854 (1st Cir.), cert. denied, 484 U.S. 943 (1987); *United States* v. *Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984).

[7] Section 5324 prohibits not only the structuring of transactions, but also causing a financial institution to fail to file a report or to file a report containing a material omission or misstatement of fact – if done for the purpose of evading the reporting requirements. It could not seriously be contended that in a prosecution for one of the latter offenses, the government must prove that the defendant knew it was illegal to cause a bank to file a materially inaccurate report or to fail to file a report that concededly was required. Such subversion or obstruction of a reporting duty that the defendant knows is imposed by law is inherently wrongful. The offense under Section 5324(3) of structuring financial transactions is simply one additional way in which Congress found that third parties might cause banks to evade the

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
KAREN SKRIVSETH
Attorney

MAY 1991

---

reporting requirements imposed by 31 U.S.C. 5313(a). There is no reason to suppose that, for purposes of Section 5324(3) alone, Congress intended to require proof that the defendant knew that his conduct was prohibited by a criminal statute.

- U.S. GOVERNMENT PRINTING OFFICE: 1991 — 282 061/20547